Learning on Razor's Edge: Re-Examining the Constitutionality of School District Policies Restricting Educationally Disruptive Student Speech

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I. INTRODUCTION

In *Davis v. Monroe County Board of Education*, the Supreme Court dramatically altered the landscape of public education by granting students a private right of action against their school for student-on-student sexual harassment under Title IX.[1] Pursuant to *Davis*, a student may bring a "hostile environment" harassment claim under Title IX if the "sexual harassment . . . is so severe, pervasive, and objectively offensive" so as to "detract[] from the victims' educational experience."[2] Although *Davis* does not mandate that a school district adopt and enforce an anti-harassment policy to avoid liability, the specter of *Davis* liability led many school districts to adopt and implement vigorous and restrictive anti-harassment policies.[3] In the decade following *Davis*, federal courts have addressed multiple facial challenges to anti-harassment policies drafted in the shadow of *Davis*.[4]

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[1] 526 U.S. 629, 645 (1999) (construing Title IX as providing students with a private right of action against a public school that "exercises substantial control over both the harasser and the context in which the known harassment occurs"). *Cf.* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (construing Title IX as providing students with a private right of action against a public school for teacher-on-student harassment); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (same).

[2] *Davis*, 526 U.S. at 651.

[3] The *Davis* Court gave school boards powerful incentives to draft and enforce vigorous anti-harassment policies. By explicitly holding that "recipients of federal funding may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority" and "in [the classroom] setting the [School] Board exercises significant control over the harasser." *Id.* at 646–47. Although *Davis* dealt exclusively with sexual harassment under Title IX, the various circuit courts have recognized a similar cause of action under Title VI for "hostile racial environment" harassment. *See, e.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1035 (9th Cir. 1998); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 930 (10th Cir. 2003); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 n.5 (3d Cir. 2001) ("Although both *Franklin* and *Davis* dealt with sexual harassment under Title IX, we believe that their reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI [race, color, or national origin] and other relevant federal anti-discrimination statutes [disability or age]."). Accordingly, a plausible argument exists that *Davis*'s Title IX analysis applies to racial harassment under Title VI and harassment on the basis of disability under the Rehabilitation Act of 1973. *See* 42 U.S.C. § 2000d (2004); 29 U.S.C. § 794 (2004).

[4] *See, e.g.*, Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 670 (7th Cir. 2008) (analyzing

Responding to this national controversy, courts have developed competing approaches to "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech."[5] Applying conventional First Amendment jurisprudence, some courts have struck down such anti-harassment policies as "unconstitutionally overbroad."[6] Conversely, other courts have determined substantively identical policies[7] to be constitutional under controlling First Amendment precedent.[8] In operation, this harsh climate of legal uncertainty places school authorities on a "razor's edge" when drafting student conduct policies in conformity with student speech jurisprudence.[9] Where a school adopts and enforces an anti-harassment policy prohibiting psychologically harmful student speech, the school is subject to a possible First Amendment challenge. However, where a school fails to adopt and enforce a policy prohibiting "disparaging comment[s] directed at an individual's sex, race, or some other personal characteristic,"[10] the school lays the foundation for a potential student-on-student harassment claim under Title IX.[11] Due to *Davis's* "severe, pervasive, and objectively offensive" requirement, isolated instances of psychologically harmful student speech often fail to constitute a hostile environment.[12] Because "[t]here is no categorical 'harassment exception' to the First

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the constitutionality of a school policy forbidding "'derogatory comments,' oral or written, 'that refer to race, ethnicity, religion, gender, sexual orientation, or disability'"); *Saxe*, 240 F.3d at 202–03 (analyzing the constitutionality of a school board policy providing, "Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment" and "[a]ny harassment of a student by a member of the school community is a violation of this policy").

[5] *Saxe*, 240 F.3d at 209.

[6] *E.g.*, *id.* at 217 (voiding anti-harassment school board policy as "unconstitutionally overbroad"). *Cf.* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 975 (S.D. Ohio 2005) (finding school policy unconstitutional as applied to student-plaintiff).

[7] *Compare Saxe*, 240 F.3d at 202 (finding school board policy prohibiting "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics" to be unconstitutionally overbroad), *with Nuxoll*, 523 F.3d at 670 (finding school policy prohibiting "'derogatory comments,' oral or written, 'that refer to race, ethnicity, religion, gender, sexual orientation, or disability'" to be facially constitutional).

[8] *See, e.g.*, *Nuxoll*, 523 F.3d at 674–75 (upholding school policy as constitutional under *Tinker v. Des Moines Independent Community Schools'* 393 U.S. 503 (1969 "substantial disruption" standard); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006) (upholding school's restriction of psychologically harmful student speech as constitutional under *Tinker*'s purported "rights of other students" standard), *vacated as moot*, 549 U.S. 1266.

[9] *See Nuxoll*, 523 F.3d at 675 (expressing concern that "if the rule is invalidated the school will be placed on a *razor's edge*, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment") (emphasis added).

[10] *Saxe*, 240 F.3d at 206.

[11] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641–45 (1999) (construing Title IX as providing students with a private right of action against a public school that "exercises substantial control over both the harasser and the context in which the known harassment occurs"). *Cf.* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (construing Title IX as providing students with a private right of action against a public school for teacher-on-student harassment); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (same).

[12] *Davis*, 526 U.S. at 650.

Amendment's free speech clause,"[13] such isolated instances of psychologically harmful student speech must be restricted in accordance with established student-speech jurisprudence. Accordingly, public school officials must tread carefully when confronting psychologically harmful student speech.

This Note posits a standard supporting a school's ability to limit psychologically harmful student speech within the framework of existing First Amendment jurisprudence. Although the Supreme Court has yet to address the constitutionality of restricting psychologically harmful student speech in public schools, *Tinker v. Des Moines Independent Community Schools*[14] is generally accepted as the default standard for student free speech rights.[15] Under *Tinker*, a school may restrict student speech only where that speech "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students."[16] Evaluating the effects of psychologically harmful student speech on students and administrators, this Note ultimately argues for a broad construction of *Tinker's* "substantial disruption" standard, permitting schools to implement viewpoint-neutral regulations on psychologically harmful student speech.[17]

Part II examines and discusses the effects of psychologically harmful student speech on students, administrators, and school districts. Part III examines the Supreme Court's First Amendment jurisprudence in the context of public education. Part IV analyzes the various approaches employed by lower courts regarding psychologically harmful student speech. Specifically, Part IV discusses the impact of *Morse v. Frederick*[18] on extensions of *Tinker* and its progeny at the circuit level. Part V examines *Nuxoll v. Indian Prairie School District No. 204*,[19] specifically discussing Judge Posner's post-*Morse* approach to restricting psychologically harmful student speech. Finally, Part VI posits a model student conduct policy and examines relevant jurisdictional considerations.

II. THE NEED TO COMBAT PSYCHOLOGICALLY HARMFUL STUDENT SPEECH IN PUBLIC SCHOOLS

Across the nation, local school boards possess powerful incentives

[13] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).

[14] 393 U.S. 503 (1969).

[15] *See generally* Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 838 (2008).

[16] *Tinker*, 393 U.S. at 509.

[17] The *Tinker* Court described "substantial disruption" as student speech that: (i) "would substantially interfere with the work of the school," *id.* at 509, (ii) "materially disrupts classwork," *id.* at 513, and (iii) "involves substantial disorder." *Id.*

[18] 551 U.S. 393 (2007).

[19] 523 F.3d 668 (7th Cir. 2008).

to enact and enforce vigorous anti-harassment student speech policies. From a pedagogical perspective, a student speech policy prohibiting educationally disruptive speech preserves a classroom environment conducive to learning. From a legal perspective, a student speech policy prohibiting such speech may preemptively minimize a school district's exposure to *Davis* liability. This part seeks to examine the effects of psychologically harmful student speech on students and school districts.

A. Emerging Research Shows a Correlation Between Psychologically Harmful Student Speech and Educational Harm

Over the past decade, a developing body of research shows a correlation between psychologically harmful student speech and negative educational outcomes. Although the evidence is not yet conclusive, an emerging consensus links subjectively harassing student speech with declining grades, increased truancy, and other educationally harmful consequences.[20]

For example, a 2001 study, *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School*,[21] extensively analyzes the behavioral impact of sexual harassment on high school students.[22] According to the study commissioned by the American Association of University Women ("AAUW"), 27% of high school students experience some form of sexual harassment "often."[23] Alarmingly, of those students experiencing sexual harassment: 22% report to "[n]ot want to go to school," 20% "[f]ind it hard to pay attention in school," 16% "[f]ind it hard to study," 16% "[s]tay home from school or cut a class," 13% report "[m]ak[ing] a lower grade on a test or paper than [they] think [they] otherwise would have," 4% "change schools," and 3% "drop out of a course."[24]

Contrasted with earlier research commissioned by the same organization in 1993,[25] "[t]he biggest change in the type of harassment experienced from 1993 to [2001] is the incidence of students being called gay or lesbian: a jump from 17 percent in 1993 to 36 percent [in 2001]."[26] Ultimately, the AAUW study reaches three "major findings" regarding sexually harassing student speech. First, the study notes a significant rise in the number of students experiencing sexual harassment

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[20] JODI LIPSON, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 1 (2001), *available at* http://www.aauw.org/research/upload/hostilehallways.pdf.

[21] *Id.*

[22] *See id.* at 36–38.

[23] *Id.* at 4.

[24] *Id.* at 37.

[25] AM. ASS'N OF EDU. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993).

[26] *See* LIPSON, *supra* note 20, at 21.

when compared to the 1993 study.[27] Second, an increasing amount of statistical evidence supports the notion that "[s]chool sexual harassment has a negative impact on students' emotional and educational lives."[28] Finally, the study notes that students in 2001 were more likely to "know what sexual harassment is" and "to say their schools have a policy or distribute literature on sexual harassment."[29]

Similarly, a 2004 study observes, "gay, lesbian, or bisexual adolescents (defined by sexual behavior, sexual attraction, or self-labeling) are more likely than other adolescents to report being involved in fights or to be the targets of harassment."[30] Although the study sample included individuals years removed from high school, "[t]hirty-seven percent of the participants reported that they had experienced verbal harassment during the preceding 6 months because of their sexual orientation," and "[t]hese types of mistreatment were associated with lower self-esteem and a [two]-fold increase in the odds of reporting suicidal ideation."[31] In light of "the potentially life-threatening nature of these acts and their psychological correlates," the study recommends that "policymakers should attend to the effects of harassment, discrimination, and violence on young gay men if they hope to improve the lives of this vulnerable population."[32] Because "[m]en younger than 21 years of age may be at higher risk for a number of reasons,"[33] the study concludes, "the surest means of preventing anti-gay harassment, discrimination, and physical violence is to implement and enforce policies that prohibit and punish these acts."[34]

Additional studies show a similar correlation between subjectively harassing speech on the basis of race[35] or gender[36] and negative

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[27] *Id.* at 4.

[28] *Id.*

[29] *Id.* ("*Students [in 2001] are much more likely than those in 1993 to say their schools have a policy or distribute literature on sexual harassment:* Seven in 10 students (69 percent), compared to just 26 percent in 1993, say their schools have a policy on sexual harassment to deal with sexual harassment issues and complaints.") (emphasis in original).

[30] David M. Huebner et al., *Experiences of Harassment, Discrimination, and Physical Violence Among Young Gay and Bisexual Men*, 94 AM J. OF PUB. HEALTH 1200, 1200 (2004).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1202 ("Men younger than 21 years of age may be at higher risk for a number of reasons; for example, relative to older men, they may have less independence and control over their lives, making it difficult for them to access safe venues where gay and bisexual men gather. In addition, individuals who self-identify as gay at younger ages may be more gender nonconforming, increasing perpetrators' ability to identify them as targets for anti-gay bias. Finally, studies suggest that perpetrators of anti-gay violence tend to be younger themselves, and thus young men may be targeted more frequently because their peers are more likely to be perpetrators.") (citating Heidi M. Levitt & Sharon G. Horne, *Explorations of Lesbian-Queer Genders: Butch, Femme, Androgynous or "Other"*, 6 J. LESBIAN STUDIES, 25–39 (2002); GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 116–17 (Columbia University Press 1991)).

[34] *Id.*

[35] *See, e.g.*, Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCHOL. 144–68 (1996).

[36] *See, e.g.*, Hope Landrine, et al., *Physical and Psychiatric Correlates of Gender Discrimination: An Application of the Schedule of Sexist Events*, 19 PSYCHOL. OF WOMEN Q. 473–92 (1995).

psychological effects. Although dissenters exist within the scientific community,[37] an emerging consensus "link[s] minority-specific stress to negative physical and mental health outcomes."[38] Beyond the academic literature, federal harassment laws provide school districts with powerful incentives to adopt and enforce restrictive student speech policies.

B. Potential School District Liability

Three federal anti-harassment statutes are of primary importance for educators, administrators, and local school boards. First, Title IX of the Education Amendments of 1972 provides, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ."[39] Second, Title VI of the Civil Rights Act of 1964 provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or subjected to discrimination

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[37] *See, e.g.*, Huebner, *supra* note 30, at 1201–02 ("The associations observed between experiences of mistreatment and markers of psychological distress are subject to a number of interpretations. . . . For instance, men with preexisting low self-esteem or suicidal ideation may be more vulnerable to and more likely to be targeted by perpetrators of mistreatment. Alternately, men with greater psychological distress may simply be more likely to report mistreatment or to interpret ambiguous negative events as anti-gay discrimination or harassment.").

[38] *Id.* at 1200 ("Recent research involving gay and lesbian individuals has documented associations between psychological distress and both perceptions of discrimination and experiences of victimization. *These findings are consistent with research examining the consequences of mistreatment among other marginalized groups and with theories linking minority-specific stress to negative physical and mental health outcomes.*") (emphasis added) (citing Diaz et al., *The impact of homophobia, poverty, and racism on the mental health of gay and bisexual Latino men: findings from 3 US cities*, 91 AM. J. PUB. HEALTH 927 (2001)); V.M. Mays & S.D. Cochran, *Mental health correlates of perceived discrimination among lesbian, gay, and bisexual adults in the United States*, 91 AM. J. PUB. HEALTH 1869 (2001); S.L. Hershberger & A.R. D'Augelli, *The impact of victimization on the mental health and suicidality of lesbian, gay, and bisexual youths*, 31 DEV PSYCHOL. 65 (1995); Herek et al., *Psychological sequelae of hate-crime victimization among lesbian, gay, and bisexual adults*, 67 J. CONSULTING CLINICAL PSYCHOL. 945 (1999); Waldo et al., *Antecedents and consequences of victimization of lesbian, gay, and bisexual young people: a structural model comparing rural university and urban samples*, 26 AM. J. COMMUNITY PSYCHOL. 307 (1998); A.R. Fischer & C.M. Shaw, *African Americans' mental health and perceptions of racist discrimination: the moderating effects of racial socialization experiences and self-esteem*. 46 J. COUNSELING PSYCHOL. 395 (1999); Kessler et al., *The prevalence, distribution, and mental health correlates of perceived discrimination in the United States*, 40 J. HEALTH SOC. BEHAV. 208 (1999); H. Landrine & E.A. Klonoff, *The Schedule of Racist Events: a measure of racial discrimination and a study of its negative physical and mental health consequences*, 22 J. BLACK PSYCHOL.168 (1996); Landrine et al. *Physical and psychiatric correlates of gender discrimination: an application of the Schedule of Sexist Events*, 19 PSYCHOL. WOMEN Q. 473 (1995); K.W. Allison, *Stress and oppressed social category membership*, *in* PREJUDICE:THE TARGET'S PERSPECTIVE 145–70 (J.K. Swim & C. Strangor, eds., Academic Press Inc. 1998); J.K. Swim et al., *Experiencing everyday prejudice and discrimination*, *in* PREJUDICE:THE TARGET'S PERSPECTIVE 37–60 (J.K. Swim & C. Strangor, eds., Academic Press Inc. 1998); M.F. Peters & G. Massey, Mundane extreme environmental stress in family stress theories: the case of black families in white America, 6 MARRIAGE FAM. REV. 193 (1983); H.F. Meyers, *Stress, ethnicity, and social class: a model for research with black populations*, *in* MINORITY MENTAL HEALTH 118-48 (E.E. Jones & S.J. Korchin eds., Praeger 1982)).

[39] 20 U.S.C. § 1681(a) (1972).

under any program or activity receiving federal funding."[40] Finally, the Rehabilitation Act of 1973 makes it unlawful for an "otherwise qualified individual with a disability . . . [to] be excluded from the participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[41]

In 1999, the *Davis* Court radically altered public education by construing Title IX's "discrimination" provision[42] to provide a private right of action for student-on-student harassment.[43] Although the Supreme Court has yet to recognize a student's private right of action beyond Title IX's sexual harassment protections, a strong argument exists that a similar private right of action arises under the "discrimination" provisions of Title VI and the Rehabilitation Act.[44] The circuit courts have displayed a willingness to read a private right of action into Title VI for student-on-student racial harassment.[45]

Pursuant to *Davis*, a student-plaintiff must establish three elements to articulate a student-on-student "hostile environment harassment" claim under Title IX.[46] First, the sexual harassment must be "so severe, pervasive, and objectively offensive [that it] so undermines and detracts from the victims' educational experience."[47] Second, the school district must act with "deliberate indifference" to sexual harassment "tak[ing] place in a context subject to the school district's control."[48] Third, a school district employee must have actual knowledge of the sexual harassment.[49] The *Davis* Court specifically stressed the importance of evidence indicating education harm, noting that a "drop-off in [the victim's] grades provides necessary evidence of a potential link between [the victim's] education and [the harasser's] misconduct."[50]

In light of the "deliberate indifference" requirement, the Court noted the inherent difficultly of proving "official indifference [from] a

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[40] 42 U.S.C. § 2000d (1964).

[41] 29 U.S.C. § 794(d) (1973); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).

[42] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) (holding "'sexual harassment' is 'discrimination' in the school context under Title IX," (citing Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 665–66 (1985)).

[43] *See id.* at 650.

[44] *Saxe*, 240 F.3d at 206 n.5 ("Although [the Supreme Court has only] dealt with sexual harassment under Title IX, we believe that their reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI and other relevant federal anti-discrimination statutes.").

[45] *E.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1032–33 (9th Cir. 1998); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 930 (10th Cir. 2003).

[46] *Davis*, 526 U.S. at 650 ("We thus conclude that funding recipients are properly held liable in damages only where they are [1] deliberately indifferent to sexual harassment, [2] of which they have actual knowledge, [3] that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.").

[47] *Id.* at 651.

[48] *Id.* at 644.

[49] *Id.* at 648.

[50] *Id.* at 652.

single instance of one-on-one peer harassment."[51] Although "a single instance of one-on-one peer harassment" in isolation does not constitute a "hostile environment,"[52] such student speech may contribute to such a claim. Because isolated "instance[s] of one-on-one peer harassment" have the potential of aggregating into an actionable Title IX claim in the face of official inaction, school districts have powerful incentives to preemptively suppress such student speech to minimize liability exposure. Where a school district adopts and enforces a restrictive anti-harassment policy, proving the requisite "deliberate indifference" becomes a virtually insurmountable burden.[53] Thus, a school district enforcing such a policy simply cannot be acting with the "deliberate indifference" to sexual harassment necessary to implicate *Davis*.

In light of this reality, school districts across the country have implemented restrictive anti-harassment student speech policies to protect every student's access to a school's educational resources.[54] From the inception of such policies, critics questioned whether otherwise protected student speech could be suppressed under the guise of harassment prevention.[55] When confronted with a constitutional challenge to a student speech restriction, lower courts often struggle to apply binding Supreme Court precedent.

III. THE FREE SPEECH RIGHTS OF PUBLIC SCHOOL STUDENTS

The seminal case of student speech jurisprudence, *Tinker v. Des Moines Independent Community School District*, arose in a climate of

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[51] *Davis*, 526 at 652–53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.").

[52] *Id.*

[53] The underlying facts of *Davis* illustrate this point. In *Davis*, the student-plaintiff articulated a recognizable claim with four pieces of evidence. First, the student-plaintiff alleged multiple acts of misconduct, including inappropriate touching and vulgar statements. *Id.* at 633. Second, although the student-plaintiff allegedly reported "each of these incidents to her mother and to her classroom teacher . . . no disciplinary action was taken" and the "conduct allegedly continued for many months." *Id.* at 633–34. Third, the student-plaintiff claimed that "the [school board] had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue." *Id.* at 635. Finally, the student-plaintiff claimed that "her previously high grades allegedly dropped as she became unable to concentrate on her studies." *Id.* at 634. Had the school district adopted and enforced a restrictive anti-harassment policy, the student-plaintiff could not have presented the requisite evidence of "deliberate indifference." Thus, a school district may preemptively foreclose *any and all* exposure to *Davis* liability by adopting and enforcing a vigorous and restrictive anti-harassment policy.

[54] *See* LIPSON, *supra* note 20, at 15 (noting a significant increase in the number of students reporting "awareness of their schools' policies and materials to address sexual harassment," rising from 26% in 1993 to 69% in 2001).

[55] *See, e.g.*, David E. Bernstein, *Defending the First Amendment From Anti-Discrimination Laws*, 82 N.C. L. REV. 223 (2003).

civil unrest surrounding the Vietnam War.[56] In *Tinker*, local school officials banned black armbands in order to subvert a planned student protest.[57] Defying the ban, five students refused to remove their armbands and received suspensions.[58] In response, the *Tinker* plaintiffs filed a First Amendment suit seeking injunctive relief against the enforcement of the school board's ban.[59] Finding the ban "reasonable because it was based upon [the school's] fear of a disturbance,"[60] the district court dismissed the complaint and the Eighth Circuit affirmed.[61] Reversing both lower courts in a 7-2 decision, the *Tinker* majority articulated the default standard for student speech restrictions.[62]

Pursuant to *Tinker*, while public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[63] the First Amendment must be "applied in light of the special characteristics of the school environment."[64] Recognizing the need for school officials "to prescribe and control conduct in the schools,"[65] the *Tinker* Court announced two circumstances where a school may restrict otherwise protected student speech: where "States and school authorities ha[ve] reason to anticipate that the [student speech] would substantially interfere with the work of the school or impinge upon the rights of other students."[66] Perhaps anticipating the pre-textual use of "interfere[nce] with the work of the school"[67] as a basis for sustaining expansive student speech restrictions, the *Tinker* majority carefully noted that "apprehension of disturbance is not enough to overcome the right to freedom of expression."[68] In the face of a First Amendment challenge, *Tinker* requires that a defendant produce "any facts which might reasonably have led school authorities to forecast

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[56] 393 U.S. 503, 504 (1969) (describing the plaintiffs' "objections to the hostilities in Vietnam and . . . support for a truce by wearing black armbands").

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 508. Significantly, the district court did not require a specific evidentiary showing to support the school's fear of "disturbance."

[61] *Tinker*, 393 at 504–05.

[62] *Id.*

[63] *Id.* at 506.

[64] *Id.*

[65] *Id.* at 507.

[66] Tinker, 393 at 509 (emphasis added). Although the majority opinion's vague and inconsistent language appears to posit two grounds for restricting student speech, very few courts have recognized Tinker's "rights of other students" standard as an independent justification for student speech restrictions. But cf. Barr v. LaFon, 538 F.3d 554, 568 (6th Cir. 2008) (recognizing in dicta "[u]nlike in Tinker, [the students'] free speech rights 'coll[ide] with the rights of others students to be secure and to be [let] alone'"); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006) (upholding school's restriction of psychologically harmful student speech as constitutional under Tinker's purported "rights of other students" standard), vacated as moot, 549 U.S. 1266; Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (upholding school's restriction of psychologically harmful student speech as constitutional, at least in part, under Tinker's purported "rights of other students" standard). Conversely, Tinker's "substantial disruption" standard is universally recognized as a constitutional basis for restricting student speech.

[67] *Tinker*, 393 U.S. at 509.

[68] *Id.* at 508 (emphasis added).

substantial disruption of or material interference with school activities."[69] Evaluating the weight of the evidence, the Court made two significant observations. First, the Court found the school district's ex post disruption justification to be pre-textual.[70] Significantly, the official school memorandum regarding the suspension of the *Tinker* plaintiffs "made no reference to the anticipation of such disruption."[71] Second, the school's ban constituted a viewpoint-based student speech restriction that did not "prohibit the wearing of all symbols of political or controversial significance."[72] Because the school failed to carry its burden of "demonstrat[ing] facts which might reasonably have led school authorities to forecast substantial disruption," the Court found the ban unconstitutional.[73]

Lower courts have struggled to consistently apply *Tinker's* holding.[74] This uncertainty belies two important distinctions created by Justice Fortas. First, the First Amendment does not protect "actually or potentially disruptive conduct"[75] or "interference, actual or nascent, with the schools' work."[76] Although the "apprehension of disturbance is not enough to overcome the right to freedom of expression,"[77] *Tinker* does not require schools to wait until a disruption ensues before restricting student speech.[78] Second, where a student challenges a school policy on First Amendment grounds, *Tinker's* burden of proof requires that the school "demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption."[79] Although some courts construe *Tinker's* "reasonable forecast"[80] requirement as mandating the occurrence of a similar disruption before restricting certain types of speech,[81] a plain reading of *Tinker* provides for the restriction of student

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[69] *Id.* at 514.

[70] *Id.* at 509.

[71] *Id.*

[72] *Tinker*, 393 U.S. at 510. *Cf.* R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (striking down a municipal "hate-speech" ordinance on viewpoint discrimination grounds).

[73] *Id.* at 514.

[74] *Compare* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."), *with* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" in the absence of a prior disruption, (quoting *Tinker*, 393 U.S. at 509).

[75] *Tinker*, 393 U.S. at 505–06 (emphasis added).

[76] *Id.* at 508 (emphasis added).

[77] *Id.* (emphasis added).

[78] *Id.* at 514.

[79] *Id.* at 514 (emphasis added).

[80] *Compare* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) *with Tinker*, 393 U.S. at 514, *and id.* at 505 (implying the First Amendment does not protect "actually *or potentially* disruptive conduct") (emphasis added).

[81] *See, e.g.*, Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 259 n.7 (4th Cir. 2003) ("In the absence of past incidents, courts have concluded that school authorities have failed to establish a sufficient likelihood of disruption to support the ban on speech."); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254 (3d Cir. 2002) (same); *Saxe*, 240 F.3d at 212; Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 543 (6th Cir. 2001) (construing *Tinker* to require "actual

speech, irrespective of prior events, where school officials reasonably forecast a nascent or potential disruption.[82]

The Court next addressed the issue of student speech in 1986, and this ruling, *Bethel School District No. 403 v. Fraser*, articulated a far more deferential standard for the suppression of student speech.[83] In *Fraser*, the plaintiff delivered a sexually charged nomination speech to a high school assembly.[84] The school severely punished Fraser[85] in accordance with an established disruptive conduct policy,[86] and Fraser responded with a First Amendment claim seeking injunctive and monetary relief under 14 U.S.C. § 1983.[87] The district court found for *Fraser*: voiding the school's "disruptive conduct" policy as unconstitutional, providing injunctive relief, and awarding nominal damages.[88] The Ninth Circuit affirmed, finding the case "indistinguishable from the protest armband in *Tinker*."[89]

The Supreme Court reversed with a five-justice majority, noting the "marked distinction" between Fraser's sexually charged speech and the political message of the *Tinker* students.[90] In a striking break with *Tinker's* substantial disruption analysis, the *Fraser* Court first analyzed the "basic educational mission" of public education: "inculcati[ng] fundamental values necessary to the maintenance of a democratic political system."[91] Significantly, the Court recognized "these 'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students" [92] and "[t]he inculcation of these values is truly the

racially motivated violence" for a school's ban on racially divisive symbols to pass constitutional muster); *Nixon*, 383 F. Supp. 2d at 973 (construing *Tinker* to require "evidence of any history of violence or disorder in the school or any other circumstances that would justify a reasonable likelihood of disruption"); Bragg v. Swanson, 371 F. Supp. 2d 814, 826 (W.D. W. Va. 2005) (holding "[t]he starting point in the analysis is the school's history of any instances where the [student speech] disrupted the learning environment or interfered with the rights of others").

[82] *See Tinker*, 393 U.S. at 514 (requiring only a "demonstrat[ion of] any facts which *might reasonably* have led school authorities to *forecast* substantial disruption of or material interference with school activities" for a restriction to pass constitutional muster (emphasis added)).

[83] 478 U.S. 675, 685 (1986).

[84] *Id.* at 677 ("Matthew N. Fraser, a [high school student], delivered a speech nominating a fellow student for student elective office. Approximately 600 students, many of whom were 14-year-olds attended the assembly. . . . Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.").

[85] *Id.* at 678 (As punishment for his speech, Fraser received a three-day suspension and was "removed from the list of candidates for graduation speaker at the school's commencement exercises.").

[86] *See id.* The relevant portion of the school policy provides "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

[87] *Id.* at 679.

[88] *Fraser*, 478 U.S. at 679.

[89] *Id.*

[90] *Id.* at 680.

[91] *Id.* at 680–81 (citing Ambach v. Norwick 441 U.S. 68, 76–77 (1979)). Because "[t]he determination of what manner of speech in the classroom or in school assembly . . . rests with the school board," a school may proscribe student speech inconsistent with its educational mission. *Id.* at 683.

[92] *Id.*

'work of the schools.'"[93]

Drawing upon this framework, the Court announced a categorical exception to the *Tinker* standard for "lewd, indecent, or [plainly] offensive speech and conduct."[94] Because the First Amendment does not protect student speech that "would undermine the school's basic educational mission,"[95] Chief Justice Burger proclaimed that a school may "disassociate itself" from speech "wholly inconsistent with the 'fundamental values' of public school education."[96] Balancing Fraser's free speech rights against the school's "basic educational mission,"[97] the Court found lewd, indecent, and offensive speech outside the scope of the First Amendment's protection.[98] Accordingly, the Court found the school's actions constitutional.[99]

Much uncertainty surrounds the scope of *Fraser's* holding. Although a majority of courts and commentators read *Fraser* as a narrow, categorical exception to *Tinker's* substantial disruption baseline,[100] a plausible argument exists that *Fraser* constitutes an alternative basis for restricting all student speech "inconsistent with [a school's] basic educational mission."[101] Significantly, *Fraser* provides that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[102] Accordingly, at least three circuit courts have applied *Fraser's* more deferential standard to the issue of psychologically harmful student speech.[103]

In 1988, the Supreme Court extended *Fraser's* basic educational mission analysis in *Hazelwood School District v. Kuhlmeier*, distinguishing conventional student speech from school-sponsored speech.[104] In *Hazelwood*, a school principal censored two controversial student-written articles[105] from the student newspaper pursuant to a

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[93] *Fraser*, 478 U.S. at 683 (quoting *Tinker*, 393 U.S. at 508).

[94] *Id.*

[95] *Id.* at 685.

[96] *Id.* at 685–86.

[97] *Id.* at 681.

[98] *Fraser*, 478 U.S. at 683.

[99] *Id.* at 685.

[100] *C.f.* Brandt v. Bd. of Educ. of Chicago, 480 F.3d 460, 467 (7th Cir. 2007) (finding a school's restriction of student speech constitutional in light of "the Supreme Court's admonition that 'a school need not tolerate student speech that is inconsistent with its basic educational mission'") (citations omitted); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. 2003) (accepting order from district court, which concluded that "school officials can appropriately censure students' speech" pursuant to (i) *Tinker's* "substantial disruption" analysis, or (ii) *Fraser's* "basic educational mission" analysis); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) (holding that school officials can censor student speech promoting values "patently contrary to the school's educational mission").

[101] *Brandt*, 480 F.3d at 467.

[102] *Fraser*, 478 U.S. at 683.

[103] *See Brandt*, 480 F.3d at 467; *Scott*, 324 F.3d at 1248; *Boroff*, 220 F.3d at 470.

[104] (*Hazelwood*), 484 U.S. 260, 273 (1988).

[105] *Id.* at 263 ("One of the stories described three [of the high school's] students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.").

school board policy.[106] Responding to this censorship, the *Hazelwood* plaintiffs brought a First Amendment challenge.[107] Although the district court found for the school,[108] the Eighth Circuit reversed pursuant to *Tinker's* substantial disruption analysis.[109] The *Hazelwood* Court reversed, articulating a second categorical exception to *Tinker* for "school-sponsored" student speech.[110]

Distinguishing *Tinker's* requirement of substantial disruption,[111] the *Hazelwood* Court affirmed *Fraser's* sweeping language and deferential balancing standard.[112] The Court employed a two-step analysis,[113] which recognized that a school may restrict student speech "inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school."[114] First, the Court asked whether the school newspaper "may appropriately be characterized as a forum for public expression."[115] Finding the school newspaper to be a non-public forum,[116] the Court held "school officials may impose reasonable restrictions on the speech of students" when it "bears the imprimatur of the school."[117] Second, the Court asked "whether the First Amendment requires a school affirmatively to promote particular student speech."[118] Distinguishing *Tinker*,[119] the Court held that a school may regulate "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical

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[106] *Id.* at 268–69. The relevant policy gave school officials editorial discretion over student articles not "within the rules of responsible journalism . . . ." *Id.* at 269.

[107] Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450 (E.D. Mo. 1985), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).

[108] *Id.* at 1467.

[109] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1370 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).

[110] *See Hazelwood*, 484 U.S. at 273 (holding that a school may restrict "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

[111] *Id.* at 266 (recognizing that student speech may be restricted where "school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'") (quoting *Tinker*, 393 U.S. at 509).

[112] See id. at 266–67. The Hazelwood Court recognized that (i) a school may restrict student speech "inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school," (ii) a school may "disassociate itself" from student speech "wholly inconsistent with the 'fundamental values' of public school education," and (iii) "'the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board,' rather than with the federal courts." Id. (citations omitted).

[113] *Id.* at 267–73.

[114] *Hazelwood*, 484 U.S. at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

[115] *Id.* at 267.

[116] *Id.* at 269–70. Because (i) school facilities constitute "public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,'" and (ii) a school board policy vested editorial discretion over the newspaper in the principal, the Court concluded that "no public forum has been created, and school officials may impose reasonable restrictions on the speech of students. . . ." *Id.* at 267–71.

[117] *Id.* at 267, 271.

[118] *Id.* at 270–71.

[119] *Hazelwood*, 484 U.S. at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.").

concerns."[120] Applying this standard to the facts, the Court found the school's actions consistent with "legitimate pedagogical concerns" and, therefore, constitutional.[121] Due to the Court's imprecise language and two-step analysis, courts and commentators have debated the scope of *Hazelwood's* holding for two decades.[122]

In 2007, a divided Court returned to the issue of student speech in *Morse v. Frederick*,[123] which created yet another categorical exception to *Tinker's* substantial disruption analysis. In *Morse*, a high school student unfurled a banner reading "BONG HiTS 4 JESUS"[124] at "a school-sanctioned and school-supervised event."[125] Pursuant to a school board policy prohibiting "expression that . . . advocates the use of substances that are illegal to minors,"[126] the school's principal "demanded that the banner be taken down."[127] When Frederick refused, the principal "confiscated the banner" and suspended Frederick for ten days.[128] Frederick filed a First Amendment challenge, and the district court granted summary judgment in favor of the school.[129] The Ninth Circuit reversed, finding the principal's actions inconsistent with *Tinker's* substantial disruption analysis and rejecting her qualified immunity defense.[130]

After determining that *Morse* was a school speech case"[131] the Court generally affirmed *Tinker* and *Fraser*[132] as controlling precedent.[133] However, the *Morse* Court abandoned the "basic educational mission" rationale employed in both *Fraser* and *Hazelwood*.[134] Instead, the *Morse* Court "distilled" two narrow

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[120] *Id.* at 273.

[121] *Id.*

[122] *See infra* note 148, *see also* Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 838 (2008).

[123] 551 U.S. 393 (2007).

[124] *Id.* at 397.

[125] *Id.* at 396. Despite Frederick's argument that the *Tinker*, *Fraser*, and *Hazelwood* analyses were inapplicable to off-campus student speech, the Court abruptly concluded "we reject Frederick's argument that this is not a school speech case . . . ." *Id.* at 400.

[126] *See id.* at 398.

[127] *Id.*

[128] *Morse*, 551 U.S. at 398.

[129] *Id.* at 399.

[130] Frederick v. Morse, 439 F.3d 1114,1121–23, 1125 (9th Cir. 2006), *rev'd*, 551 U.S. 393 (2007).

[131] *Morse*, 551 U.S. at 400 (rejecting Frederick's assertion that student speech jurisprudence does not control off-campus student speech).

[132] It should be noted that the *Morse* majority declined to extend *Fraser*'s "plainly 'offensive'" language to "encompass any speech that could fit under some definition of 'offensive.'" *Id.* at 409.

[133] See id. at 403–05. Despite labeling the case as "instructive," the Morse Court explicitly held "[Hazelwood] does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur." Id. at 405.

[134] *Compare id.* at 404–05 (refusing to endorse *Fraser*'s "educational mission" analysis, instead distilling two limited principals necessary for resolution), *with Hazelwood*, 484 U.S. at 266–67 (recognizing that (i) a school may restrict student speech "inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school," (ii) a school may "disassociate itself" from student speech "wholly inconsistent with the 'fundamental values' of public school education," and "'the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board,' rather than with the federal

principles from *Fraser*.[135] First, it held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults"[136] and should be applied "in light of the special characteristics of the school environment."[137] Second, it held that "the mode of analysis set forth in *Tinker* is not absolute."[138] Building on this framework, the Court noted the compelling[139] "governmental interest in stopping student drug abuse"[140] and cited the harmful "physical, psychological, and addictive effects of drugs."[141] Accordingly, the majority announced a third categorical exception to *Tinker*: "The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[142] Concluding that Frederick's message could be reasonably construed as promoting drug use,[143] the Court found the school's actions constitutional.[144]

Although Justice Alito joined the *Morse* majority, he provided a strongly-worded concurring opinion of debatable importance.[145] Attempting to narrow the scope of the majority's holding, Justice Alito wrote, "I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions."[146] Although the *Morse* majority merely rejected reading *Fraser* "to encompass any speech that could fit under some definition of 'offensive,'"[147] Justice

courts") (quoting Bethel Sch. Dist. No. 403 v. Fraser , 478 U.S. 675, 683, 685–686 (1986)).

[135] *See Morse*, 551 U.S. at 404–05 ("We need not resolve [the basic educational mission] debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles.")

[136] *Id.* at 404 (quoting *Fraser*, 478 U.S. at 682).

[137] *Id.* at 405 (quoting *Tinker*, 393 U.S. at 506).

[138] *Id.* ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.") (citing *Tinker*, 393 U.S. at 514).

[139] *Id.* at 407 (taking notice of prior Supreme Court jurisprudence and recognizing "that deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest") (quotingVernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[140] *Morse*, 551 U.S. at 408.

[141] *Id.* at 407 As justification for the compelling governmental interest, the *Morse* Court observed (i) "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use" and (ii) "[t]housands of school boards . . . have adopted policies aimed at effectuating this message." *Id.* at 408.

[142] *Id.* at 408.

[143] *Id.* at 410 (finding "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one").

[144] *Id.*

[145] *Compare* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007) (construing Justice Alito's concurrence to be the "controlling" opinion of *Morse* because Justice Alito articulated the narrowest holding of a member of the five Justice majority), *with* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 672–73 (7th Cir. 2008) (construing Justice Roberts majority opinion to be the controlling opinion of *Morse* because five justices "joined the majority opinion, not just the decision").

[146] *Morse*, 551 U.S. at 423 (Alito, J., concurring).

[147] *Id.* at 409. ("Petitioners urge us to adopt the broader rule that [student] speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'") (citations omitted).

Alito discarded outright the notion that "public school officials [may] censor any student speech that interferes with a school's 'educational mission.'"[148] Because a school's "educational mission" is determined by the political motivations of an elected school board, Justice Alito feared such a rule "would give public school authorities a license to suppress speech on political and social issues . . . strik[ing] at the very heart of the First Amendment."[149]

Beyond affirming *Tinker's* substantial disruption analysis as the baseline standard for evaluating student speech restrictions, the ultimate ramifications of *Morse* are difficult to predict with certainty. Perhaps inadvertently, the *Morse* Court's analysis established a logical framework for future expansion.[150] Reasoning by analogy, a plausible argument exists that the underlying rationale behind *Morse*, protecting the physical and psychological well-being of students while they are at school, justifies the creation of additional categorical exceptions where it can be proven that certain speech poses as much of a threat as drug-related speech. Following this rationale, the Fifth Circuit established a novel categorical exception for "speech that gravely and uniquely threatens violence. . . ."[151]

In *Ponce v. Socorro Independent School District*, the Fifth Circuit expanded the scope of *Morse* by analogizing the harm presented by illegal drug use with that of imminent physical violence.[152] According to the *Ponce* court, *Morse* stands for the proposition that when particular student speech implicates a "compelling interest,"[153] it "is per se unprotected [from First Amendment protection] because of the scope of the harm it potentially foments."[154] Because the court found the prevention of imminent physical violence to be a compelling governmental interest, speech implicating that activity "may be prohibited by school administrators with little further inquiry."[155] Upon this analytical foundation, the *Ponce* court announced a categorical exception for student "speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a

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[148] *Id. But cf.* Brandt v. Bd. of Educ. of Chicago, 480 F.3d 460, 467 (7th Cir. 2007) (upholding the constitutionality of school district's restriction of student speech that was "inconsistent with its 'basic educational mission.'" (citing *Hazelwood*, 484 U.S. at 266)); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248–49 (11th Cir. 2003) (construing *Fraser* to allow for the restriction of non-disruptive student speech inconsistent with a school district's basic educational mission); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) (holding where particular student speech is "so patently contrary to the school's educational mission, the [s]chool has the authority" to prohibit that student speech).

[149] *Morse*, 551 U.S. at 423 (Alito, J., concurring).

[150] *See infra* notes 151–70.

[151] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 772 (5th Cir. 2007).

[152] *Id.* at 771–72 (citing *Morse*, 551 U.S. at 425).

[153] *Id.* at 769; *see also Morse*, 551 U.S. at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[154] *Ponce*, 508 F.3d at 769.

[155] *Id.*

whole."[156]

The *Ponce* court's reasoning may be applied with equal resonance to the issue of harassing student speech. In *Morse*, the majority apparently declined to apply *Tinker's* substantial disruption analysis in light of a school's "important—indeed, perhaps compelling" interest in deterring drug use by schoolchildren.[157] The *Morse* Court cited three pieces of evidence in declaring the deterrence of student drug use to be a compelling governmental interest.

First, the *Morse* Court cited precedent indicating that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[158] Similarly, peer-reviewed medical research indicates that homosexual "[m]en younger than 21 years of age may be at higher risk [of anti-gay harassment, discrimination, and physical violence] for a number of reasons" including a lack of "independence and control over their lives" and the fact "that perpetrators of anti-gay violence tend to be younger themselves, and thus young men may be targeted more frequently because their peers are more likely to be perpetrators."[159] Accordingly, both drug use and peer harassment pose a substantial threat to educational development. Second, the *Morse* Court observed, "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use."[160] Similarly, through Title VI and Title IX, Congress has prohibited "discrimination" in public schools receiving "federal financial assistance"[161] and the Supreme Court has "determined that 'sexual harassment' is 'discrimination' in the school context under Title IX."[162] Thus, both drug use and peer harassment implicate a national regulatory program. Third, the *Morse* Court noted with approval that "[t]housands of school boards throughout the country . . . have adopted policies aimed at effectuating this message [of educating students about the dangers of illegal drug use]."[163] Again, empirical evidence shows a dramatic rise in the number of school districts "hav[ing] adopted policies aimed at effectuating"[164] the message of harassment prevention.[165]

Because harassing student speech arguably poses as much of a threat as drug-related student speech, a plausible argument exists for excluding harassing student speech from First Amendment protection.

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[156] *Id.* at 771–72.

[157] *Morse*, 551 U.S. at 407.

[158] *Id.*

[159] *See* Huebner, *supra* note 30 at 1202.

[160] *Morse*, 551 U.S. at 408.

[161] *See supra* notes 39–41.

[162] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.").

[163] *Morse*, 551 U.S. at 408.

[164] *Id.*

[165] *See* LIPSON, *supra* note 20, at 4.

The *Morse* Court's underlying logic appears to implicate harassing student speech: "The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse (student-on-student harassment)—reflected in the policies of Congress and myriad school boards . . . —allow schools to restrict student expression that they reasonably regard as promoting illegal drug use [constituting peer harassment]."[166] The Supreme Court has previously recognized: (i)"the State's compelling interest in eliminating discrimination against women,"[167] (ii) that "'sexual harassment' is 'discrimination' in the school context under Title IX,"[168] and (iii) that the presence of a compelling governmental interest renders specific student speech beyond the scope of First Amendment protection.[169] Thus existing precedent may plausibly be synthesized to establish an additional categorical exception for sexually harassing student speech.[170] However, until the

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[166] *Morse*, 551 U.S. at 408 (emphasis added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[167] See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) ("Even if the [challenged statute] does work some slight infringement on [plaintiffs'] right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.") (emphasis added) (citations omitted); Roberts v. U.S. Jaycees, 468 U.S. 609, 623–24 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms. . . . That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.") (emphasis added). It should be noted that the "compelling interest in eradicating discrimination" recognized in the aforementioned cases arose in the context of state law anti-discrimination statutes, not Title IX. Additionally, the compelling interest is limited to the context of gender-based discrimination. However, even Justice Alito concedes that "preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) (emphasis added) (citations omitted).

[168] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.").

[169] *See Morse*, 551 U.S. at 407–08 (declining to apply *Tinker*'s substantial disruption analysis because "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest") (quoting Vernonia Sch. Dist. 475 v. Acton, 515 U.S. 646, 661 (1995)); *see also* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (5th Cir. 2007) ("To the extent that preventing a harmful activity may be classified as an 'important—indeed, perhaps compelling interest,' speech advocating that activity may be prohibited by school administrators with little further inquiry.") (quoting *Vernonia*, 515 U.S. at 661).

[170] A plausible argument exists that the combined holdings of *Roberts*, *Davis*, and *Morse* synthesize to produce a categorical exception for sexually harassing student speech. *See supra*, notes 175–77. In *Roberts*, the Court recognized a State's "compelling interest in eradicating discrimination against its female citizens." *Roberts*, 468 U.S. at 623. In *Davis*, the Court held that "sexual harassment is discrimination in the school context under Title IX." 526 U.S. at 649–50. Thus, an argument exists that *Roberts* and *Davis* recognize a school's compelling interest in eradicating sexual harassment. In *Morse*, the Court declined to apply *Tinker*'s substantial disruption analysis because "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest." *Morse*, 551 U.S. at 407 (quoting *Vernonia*, 515 U.S. at 661). At least one circuit court has construed *Morse* to require that where "preventing a harmful activity may be classified as an 'important—indeed, perhaps compelling interest,' speech advocating that activity may be prohibited by school administrators with little further inquiry." Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (quoting *Vernonia*, 515 U.S. 646). Thus, if *Morse* renders particularly harmful student speech unprotected in the presence of a compelling governmental interest; and *Roberts* and *Davis* recognize a school's compelling interest in eliminating sexual harassment against women; then a plausible argument

Supreme Court expands the scope of *Morse* to provide additional categorical exceptions, *Tinker's* substantial disruption analysis will determine the constitutionality of a given student speech policy.

Although the legal principles established by the Supreme Court in *Tinker*, *Fraser*, *Hazelwood*, and *Morse* govern psychologically harmful student speech, lower courts have struggled to coalesce these principles into a cohesive framework. While *Morse* did resolve some disputes at the circuit level, significant questions remain unanswered. First, does *Tinker* require a prior disruption before the restriction of student speech?[171] Second, how many students must be affected for student speech to constitute a substantial disruption? Third, does *Tinker* allow for student speech restrictions based upon "the rights of other students?"[172] Finally, may *Morse's* reasoning be extended by analogy to create additional categorical exceptions?[173] The circuit courts have provided conflicting answers to each of these questions.

IV. PSYCHOLOGICALLY HARMFUL STUDENT SPEECH POLICIES: THE DEBATE IN THE COURTS

Although lower courts universally recognize *Tinker* and its progeny as the controlling student speech precedent, lower courts have adopted divergent interpretations of each holding's scope, which has resulted in contradictory rulings on substantively identical school board policies.[174] The vast majority of lower courts apply a tripartite construction of student speech jurisprudence, under which all student speech falling outside the narrow exceptions articulated in *Fraser*, *Hazelwood*, and

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exists that sexually harassing student speech directed at women is excluded from First Amendment protection.

[171] *Compare Saxe*, 240 F.3d at 212 ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."), *with* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" in the absence of a prior disruption) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[172] *Compare* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) ("As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." (quoting *Tinker*, 393 U.S. at 508)), *vacated as moot*, 549 U.S. 1266 (2007), *with* Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260 (1988) ("[S]chool officials are justified in limiting student speech, under [*Tinker*'s 'rights of other students'] standard, only when [that student] speech could result in tort liability for the school.")

[173] *Ponce*, 508 F.3d at 769 ("To the extent that preventing a harmful activity may be classified as an 'important—indeed, perhaps compelling interest,' speech advocating that activity may be prohibited by administrators with little further inquiry.") (quoting *Vernonia*, 515 U.S. at 661); *see also Morse*, 551 U.S. at 407–08 (declining to apply *Tinker*'s substantial disruption analysis because "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest") (quoting *Vernonia*, 515 U.S. at 661).

[174] *See* discussion *infra* Part IV.

Morse is governed by *Tinker's* substantial disruption analysis.[175] Under this approach, a school district policy regulating psychologically harmful student speech must satisfy *Tinker's* substantial disruption requirement to pass constitutional muster.[176] However, a circuit split exists regarding the scope of *Tinker's* "reasonable forecast of substantial disruption" burden of proof.[177] On the fringe of the debate, the Ninth Circuit has applied an unorthodox construction of *Tinker* to the issue of psychologically harmful student speech, providing for the restriction of student speech that "invades the rights of other students."[178]

A. Policy Must Satisfy *Tinker's* "Substantial Disruption" Analysis

Despite broad recognition of *Tinker's* substantial disruption analysis as the default standard governing student speech codes, a circuit split exists regarding what quantum of evidence satisfies *Tinker's* required burden of proof.[179] On one hand, the Third,[180] Fourth,[181] and Eleventh[182] Circuits require "a well-founded expectation of disruption . .

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[175] *See, e.g.*, Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) ("We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech [governed by *Fraser*], (2) school-sponsored speech [governed by *Hazelwood*], and (3) speech that falls into neither of these categories [governed by *Tinker*]."); *see also* Denning & Taylor, *supra* note 15, at 838-42.

[176] *See Saxe*, 240 F.3d at 216 (Holding that because "the Policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech. . . . [The school] must therefore satisfy the *Tinker* test . . . .").

[177] *Compare id.* at 212 ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."), *with* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" even in the absence of a prior disruption) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[178] *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) ("As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.") (quoting *Tinker*, 393 U.S. at 508), *vacated as moot*, 549 U.S. 1266 (2007).

[179] *See Tinker*, 393 U.S. at 514 (suggesting that a school district's burden of proof requires "demonstrat[ing] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities").

[180] *See Saxe*, 240 F.3d at 212 ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster"); *see also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254–55 (3d Cir. 2002) (same).

[181] *See* Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 255 (4th Cir. 2003) (holding "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster") (quoting *Saxe*, 240 F.3d at 212).

[182] *See* Heinkel v. Sch. Bd. of Lee County, Fla., 194 Fed. App'x 604, 608 (2006) (striking down "content restriction unsupported by a reasonable belief of the School Board that all such expression would create substantial disruption") (unpublished opinion); *see also* Holloman v. Harland, 370 F.3d 1252, 1273 (11th Cir. 2004) (construing *Tinker* to require "a real or substantial threat of actual

. based on past incidents arising out of similar speech" for a speech restriction to survive a facial challenge.[183] Conversely, the Seventh[184] and Tenth[185] Circuits require a mere "reasonabl[e] belie[f] that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school'" for a speech restriction to pass constitutional muster.[186] In determining the validity of a given school board policy, a court's construction of *Tinker's* "reasonable forecast" is often dispositive.

B. "Reasonable Forecast" Requires a Prior Disruption Involving Similar Speech

In 2001, the Third Circuit questioned the constitutionality of preemptive student speech restrictions in *Saxe*, reversing the lower court and striking down a school district's anti-harassment policy as "facially unconstitutional under the First Amendment's free speech clause."[187] The policy at issue prohibited "verbal or physical conduct . . . which has the purpose or effect of . . . creating an intimidating, hostile or offensive environment"[188] and applied to "harassment of a student by a member of the school community."[189] Re-characterizing *Tinker's* burden of proof variously as "a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech"[190] and "a specific and significant fear of disruption,"[191] the court took issue with the policy's language "creating an intimidating, hostile, or offensive environment."[192] The court found the policy unconstitutionally overbroad[193] for three reasons. First, the court found that the school district failed to "provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student

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disorder, as opposed to the mere possibility of one").

[183] *See Saxe*, 240 F.3d at 212–15.

[184] *See* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) (rejecting overbreadth challenge where school district presented "facts which might reasonably lead school officials to forecast substantial disruption" in the absence of a prior disruption).

[185] *See* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" even in the absence of a prior disruption) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[186] *See id.* (emphasis added).

[187] 240 F.3d 200 at 202–03 (3d Cir. 2001).

[188] *Id.* at 202.

[189] *Id.* at 203.

[190] *Id.* at 212.

[191] *Saxe*, 240 F.3d at 211.

[192] *Id.* at 216.

[193] *See id.* at 217 (concluding the anti-harassment policy covers "substantially more speech than could be prohibited under *Tinker*'s substantial disruption test. Accordingly, we hold that the Policy is unconstitutionally overbroad.").

speech."[194] Further, it found that the policy "ignores *Tinker's* requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it."[195] Finally, then-Judge Alito noted that the policy is not "susceptible to a reasonable limiting construction."[196]

In 2002, a different panel of the Third Circuit affirmed *Saxe's* heightened "reasonable forecast" requirement in *Sypniewski v. Warren Hills Regional Board of Education*,[197] striking down in part a school district's racial harassment policy[198] where there was "substantial evidence of prior disruption."[199] Affirming *Saxe*, the court construed *Tinker's* burden of proof to require "a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations . . . ."[200] Applying *Saxe's* heightened "reasonable forecast" standard, the court held that "[t]he history of racial difficulties in [the school district] provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy."[201] However, "[i]n the absence of such a history, the fear of disruption is likely to be no more than 'undifferentiated fear or apprehension of disturbance.'"[202] Despite this history, the *Sypniewski* court took issue with the policy's prohibition of student speech "that creates ill will,"[203] striking the provision down as "facially overbroad."[204] Subsequent Third

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[194] *Id.* Although the school district argued that "it has an interest in avoiding liability for harassment under *Franklin* and *Davis*," then-Judge Alito rejected this notion "because the Policy prohibits substantially more conduct than would give rise to liability under these cases, this justification is unavailing." *Id.*

[195] *Id.* at 217. *But cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (allowing for the restriction of "actually *or potentially* disruptive conduct") (emphasis added).

[196] *Saxe*, 240 F.3d at 215 (noting "the elementary rule that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," the court ultimately found the policy incapable of such a narrowing construction). *Id.* at 215–17 (quoting Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa., 944 F.2d 137, 144 (3d Cir. 1991).

[197] 307 F.3d 243 (3d Cir. 2002).

[198] The racial harassment policy provided in pertinent part: "District employees and students shall not at school . . . wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive *or creates ill will* or hatred." *Id.* at 264 (emphasis added).

[199] *Id.* at 254. "[T]he history of racial hostility demonstrates the policy was intended to address a particular and concrete set of problems involving genuine disruption." *Id.* at 262.

[200] *Id.* at 257.

[201] *Id.* at 262 (distinguishing *Sypniewski* from *Saxe* on the basis of prior racial hostilities).

[202] *Sypniewski*, 307 F.3d at 262. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). The Third Circuit was careful to point out "the background of turmoil at a particular place and a particular time means that the policy would likely be unconstitutional in another school district . . . ." *Id.* at 265.

[203] *See id.* at 264–65. Although upholding the facial validity of the school district's racial harassment policy, the *Sypniewski* court singled out the racial harassment policy's subjective "ill will" provision, concluding that "protecting expression that gives rise to ill will—and nothing more—is at the core of the First Amendment." *Id.* at 265. Accordingly, the court held, "That part of the policy directed at material that 'creates ill will' is unconstitutional." *Id.*

[204] *Id.* at 258 (holding that "one provision [causing 'ill will'] creates an overbreadth problem of sufficient magnitude that it must be stricken from the policy"). Unlike other portions of the policy, the Third Circuit found this provision of the district's policy incapable of a limiting construction, and therefore facially overbroad. *Id.* at 265–66.

Circuit precedent affirms the notion that some 'harassing' speech might warrant First Amendment protection."[205]

Persuaded by then-Judge Alito's analysis, at least two other circuit courts have followed the Third Circuit's lead in striking down student conduct policies on overbreadth grounds.[206] In 2002, the Fourth Circuit adopted *Saxe's* heightened "reasonable forecast" burden of proof in *Newsom v. Albemarle* and enjoined the enforcement of a school district's dress code policy prohibiting "messages on clothing, jewelry, and personal belongings that relate to . . . weapons."[207] Adopting *Saxe's* "well-founded expectation of disruption" standard,[208] the Fourth Circuit found that "there simply is no evidence suggesting that clothing containing messages related to weapons . . . ever substantially disrupted school operations."[209] Accordingly, the court held that "[the plaintiff] has demonstrated a strong likelihood of success on the merits on his overbreadth claim."[210]

Similarly, in 2006, the Eleventh Circuit employed the overbreadth doctrine in *Heinkel v. School Board of Lee County*,[211] striking down a school district's policy prohibiting the distribution of religious materials on school premises.[212] According to the Eleventh Circuit, the absence of a prior disruption involving similar speech renders a speech restriction facially unconstitutional because it is "unsupported by a reasonable belief of the School Board that all such expression would create substantial disruption."[213] District courts within the Third, Fourth, and Eleventh Circuits have displayed a willingness to strike down school

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[205] *E.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 317 (3d Cir. 2008) (finding a university's anti-harassment policy, with substantively identical language to the policy at issue in *Saxe*, facially overbroad).

[206] *E.g.*, Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 260 (4th Cir. 2003) (granting preliminary injunction against enforcement of school district policy where plaintiff "demonstrated a strong likelihood of success on the merits on his overbreadth claim"); Heinkel v. Sch. Bd. of Lee County, Fla., 194 Fed. App'x 604, 608–09 (11th Cir. 2006) (striking down a school district policy prohibiting "all religious and political symbols" as facially unconstitutional).

[207] 354 F.3d 249, 252 (4th Cir. 2003).

[208] *Id.*

[209] *Id.* at 259 n.7.

[210] *Id.* at 260.

[211] 194 Fed. App'x 604 (11th Cir. 2006). Although *Heinkel* lacks precedential value as an unpublished opinion, the Eleventh Circuit employs a legal standard similar to *Saxe*'s "well-founded expectation of disruption" requirement. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001). Ruling on an as-applied challenge in *Holloman v. Harland*, the Eleventh Circuit articulated an extremely narrow construction of *Tinker*'s substantial disruption standard, holding that school officials may not preemptively restrict student speech causing a "*de minimis*, insubstantial impact on classroom decorum." 370 F.3d 1252, 1271–73 (11th Cir. 2004). In light of *Holloman*'s de minimis disruption analysis, coupled with *Heinkel*'s persuasive value, school districts within the Eleventh Circuit face the threat of a potential overbreadth challenge.

[212] *Heinkel*, 194 Fed. App'x at 609 (sustaining a facial challenge to the policy as a prior restraint on free speech and because of the significant risk of arbitrary censorship).

[213] *Id.* at 608–09 (finding the school district's ban on religious and political symbols "a prior restraint on speech that is unconstitutional"). Although the *Heinkel* court applied *Tinker*'s substantial disruption analysis to the school-sponsored speech at issue, a strong argument exists that the facts of *Heinkel* mandate the application of *Hazelwood*'s more deferential "legitimate pedagogical concerns" public-forum analysis.

board policies on First Amendment grounds.[214]

Thus, the Third, Fourth, and Eleventh Circuits employ a heightened "reasonable forecast" analysis in determining the facial validity of a school district's anti-harassment policy. Where a school district fails to present facts showing a "well-founded expectation of disruption" based on prior disruptions involving the prohibited speech, a anti-harassment policy faces the very real threat of a successful overbreadth challenge.

C. "Reasonable Forecast" Does Not Require a Prior Disruption Involving Similar Speech

In 2000, the Tenth Circuit articulated a different rationale in *West v. Derby Unified School District No. 260*, upholding a school district's racial harassment policy in the face of an overbreadth challenge.[215] Responding to a history of racial altercations that were generally unrelated to the Confederate flag,[216] the school district adopted a policy prohibiting student speech and clothing "that is racially divisive or creates ill will or hatred," including the Confederate flag.[217] Rejecting "any notion that the Constitution requires a finding of an intent to harass or intimidate" before a school may preemptively suppress student speech,[218] the court found *Tinker's* substantial disruption standard controlling.[219] Faithfully applying *Tinker's* burden of proof to permit student speech restrictions "where school authorities reasonably believe that a student's uncontrolled exercise of expression might [cause substantial interference],"[220] the court found the absence of a prior disruption involving the flag irrelevant.[221] Because *Tinker* endowed "[t]he district [with] the power to act to prevent problems before they occurred[,] it was not limited to prohibiting and punishing conduct only

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[214] *E.g.*, Miller v. Penn Manor Sch. Dist., 588 F. Supp. 2d 606, 625–28 (E.D. Pa. 2008) (striking down provision of school district policy prohibiting "anything that is a distraction to the education environment" as "substantially overbroad"); Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1373–79 (N.D. Fla. 2008) (permanently enjoining school district's ban on "illegal organizations" and "secret societies" on vagueness grounds); Bragg v. Swanson, 371 F. Supp. 2d 814, 825–29 (W.D. W. Va. 2005) (permanently enjoining school district's ban on Confederate flag as facially overbroad).

[215] 206 F.3d 1358, 1368 (10th Cir. 2000) (holding "the harassment and intimidation policy does not threaten protected speech and is not unconstitutionally overbroad").

[216] *Id.* at 1362 (noting (i) "verbal confrontations occur[ing] between black and white students," (ii) "[m]embers of the Aryan Nation and Ku Klux Klan became active off campus circulating materials to students encouraging racism," (iii) the presence of racist graffiti including "KKK" and "Die Nigger" on school grounds).

[217] *Id.* at 1361.

[218] *Id.* at 1363.

[219] *Id.* at 1365–66 (finding the display of the Confederate flag "a form of political speech" within the meaning of the First Amendment, and thus governed by *Tinker*'s substantial disruption analysis).

[220] *See id.* at 1366 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[221] *Id.* (holding "[t]he fact that a full-fledged brawl has not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one").

after it caused a disturbance."[222] Noting the significance of the school district's limiting discretionary language within the policy,[223] the court held that "the harassment . . . policy does not threaten protected speech and is not unconstitutionally overbroad."[224]

From 2001 to 2008, the Tenth Circuit's objective "reasonable belief" construction of *Tinker* remained a minority view regarding anti-harassment policies and the overbreadth doctrine. Although outside the context of an overbreadth challenge to a student speech policy, the Second, Sixth, Eighth, and Ninth Circuits faithfully apply *Tinker's* preemptive "reasonable belief" burden of proof.[225]

In 2008, the Seventh Circuit faithfully applied *Tinker's* "reasonable belief" burden of proof in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District No. 204*[226] and upheld a school district's anti-harassment policy as "strik[ing] a reasonable balance between the competing interests [of] free speech and ordered learning."[227] In *Nuxoll*, a high school student was prohibited from wearing a tee shirt with the phrase "Be Happy, Not Gay" pursuant to a school rule banning "derogatory comments . . . that refer to race, ethnicity, religion, gender, sexual orientation, or disability."[228] Noting that "[a] judicial policy of hands off (within reason) school regulation of student speech has much to recommend it,"[229] Judge Posner construed *Tinker* to require only "facts which might reasonably lead school officials to forecast substantial disruption."[230] Applying Tinker's substantial disruption analysis in light of *Fraser* and

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[222] *Id.* at 1366–67 (citations omitted).

[223] *Id.* at 1367–68. Because "the policy permits the administrator to consider whether the student's conduct was willful, whether the student displayed the symbol in some manner, and whether the conduct had the effect of creating ill will," *id.* at 1362, the Tenth Circuit found "it likely that the policy will only apply in circumstances where it is constitutional to do so . . . ." *Id.* at 1368.

[224] *Id.*

[225] *E.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009) ("*Tinker* and its progeny allow a school to 'forecast' a disruption and take necessary precautions before racial tensions escalate out of hand"); Barr v. LaFon, 538 F.3d 554, 565–68 (6th Cir. 2008) (holding "*Tinker* does not require disruption to have actually occurred" and "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door"); Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place" (quoting Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007)), and "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonable portend disruption' from the student expression at issue" (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)); *LaVine*, 257 F.3d at 989 (holding "*Tinker* does not require school officials to wait until disruption actually occurs before they may act" and "[f]orecasting disruption is unmistakably difficult to do[;] *Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption'") (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973)).

[226] 523 F.3d 668 (7th Cir. 2008).

[227] *Id.* at 672.

[228] *Id.* at 670.

[229] *Id.* at 671.

[230] *Id.* at 673 (emphasis added) (quoting Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827–28 (7th Cir. 1998), Walker-Serrano ex rel. Walker v. Leonard, 325 F.3d 412, 416 (3d Cir. 2003), LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)) ("Taking the case law as a whole we don't think a school is required to prove that unless the speech at issue is forbidden serious consequences will *in fact* ensue.") (emphasis added). *Id.*

Morse, the court held, "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."[231] Relying on "suggestive" medical literature showing a correlation between psychologically harmful student speech and negative educational outcomes,[232] as opposed to prior disruptions based on similar student speech,[233] Judge Posner concluded, "The rule challenged by the plaintiff appears to satisfy" *Tinker's* substantial disruption analysis.[234] Accordingly, the Seventh Circuit upheld the facial validity of the school's anti-harassment policy.[235]

Thus, the Seventh and Tenth Circuits employ a more deferential "reasonable forecast" burden of proof analysis in determining the facial validity of an anti-harassment policy. Under this analysis, school officials are empowered to implement preventive anti-harassment policies in order to "take necessary precautions before . . . tensions escalate out of hand."[236] Although the Second, Sixth, Eighth, and Ninth Circuits acknowledge that "*Tinker* does not require actual disruption" to have occurred,[237] they have yet to apply this standard to a facial challenge.

D. Policy May Satisfy Tinker's "Rights of Other Students" Analysis

Controversially, a small number of lower courts recognize *Tinker's* purported "rights of other students" prong as an additional basis for

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[231] *Id.* at 674 (emphasis added).

[232] *See, e.g., supra* note 30, at 1200–01.

[233] *Nuxoll*, 523 F.3d at 671. *But cf.* Newsom v. Albermarle County Sch. Bd., 354 F.3d 249, 259 n.7 ("In the absence of past incidents, courts have concluded that school officials have failed to establish a sufficient likelihood of disruption to support the ban on speech.").

[234] *Nuxoll*, 523 F.3d at 674.

[235] *See id.* at 675.

[236] B.W.A v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009).

[237] *Id.* at 740 (holding "*Tinker* and its progeny allow a school to "forecast a disruption and take necessary precautions before racial tensions escalate out of hand"); Barr v. LaFon, 538 F.3d 554, 565–68 (6th Cir. 2008) (holding "*Tinker* does not require disruption to have actually occurred" and "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door") (quoting Lowery v. Euverand, 497 F.3d 584 (Tenn. 2007)); Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place" and "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue") (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)); *LaVine*, 257 F.3d at 989 (holding "*Tinker* does not require school officials to wait until disruption actually occurs before they may act" and "Forecasting disruption is unmistakably difficult to do. *Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.") (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973)).

student speech restrictions.[238] Under this view, *Tinker* provides for the suppression of student speech that collides "with the rights of other students to be secure and to be let alone."[239] Although *Tinker's* holding is clearly written in the disjunctive,[240] the Court failed to articulate the source and scope of the "rights" enjoyed by public school students.[241] Because of uncertainty surrounding its scope, *Tinker's* "rights of other students" remains a disfavored ground for suppressing student speech.[242] Indeed, at least one circuit judge has gone so far as to describe *Tinker's* "rights of other students" prong as mere dicta.[243]

In *Harper v. Poway Unified School District*, the Ninth Circuit ignited national controversy by recognizing *Tinker's* purported "rights of other students" prong as an independent basis for restricting student speech.[244] Although *Harper* no longer constitutes binding precedent within the Ninth Circuit, the case remains instructive for its persuasive value.[245] In *Harper*, the plaintiff attempted to wear a tee shirt proclaiming, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" to school.[246] Citing multiple anti-harassment policies[247]

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[238] *See, e.g.*, *Barr*, 538 F.3d at 567–68 (relying in part on *Tinker*'s "rights of other students" prong to uphold student speech restriction); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) (relying exclusively on *Tinker*'s "rights of other students" prong to uphold student speech restriction), *vacated as moot*, 549 U.S. 1266 (2007); Trachtman v. Anker, 563 F.2d 512, 521 (2d Cir. 1977) (relying in part on *Tinker*'s "rights of other students" prong to uphold student speech restriction) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

[239] *See Tinker*, 393 U.S. at 508.

[240] *Id.* ("There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work *or* of collision with the rights of other students to be secure and to be let alone.") (emphasis added).

[241] *Id.* Despite articulating two distinct grounds for suppressing student speech, the *Tinker* Court's application of the rule focused exclusively on "substantial disruption." *Id.* at 509–12.

[242] The vast majority of lower courts recognizing *Tinker*'s "rights of other students" prong limit its scope to student expression which violates state criminal or tort law. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) ("The precise scope of *Tinker*'s 'interference with the rights of others' language is unclear; at least one court has opined that it covers only independently tortious speech . . . . In any case, it is certainly not enough that the speech is merely offensive to some listener."). *Id.*; *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260 (1988) ("[S]chool officials are justified in limiting student speech, under [*Tinker*'s 'rights of other students'] standard, only when . . . [that student] speech could result in tort liability for the school."); *Nixon*, 383 F. Supp. 2d at 974 (same); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991) (same).

[243] *See Trachtman*, 563 F.2d at 520–21 (Mansfield, J., dissenting) ("[T]he majority, relying upon dicta in [*Tinker*], to the effect that school authorities may prohibit speech 'that intrudes upon . . . the rights of other students,' or 'involves . . . an invasion of the rights of others' would include in these amorphous terms the dissemination to others of non-disruptive, non-defamatory and non-obscene material because it might cause some kind of 'psychological' harm to an undefined number of students. With this I disagree.").

[244] 445 F.3d 1166, 1178 (9th Cir. 2006) *vacated as moot*, 549 U.S. 1266 (2007) ("As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

[245] *See* Harper v. Poway Unified Sch. Dist., 549 U.S. 1266 (2007) (vacating the judgment of the Ninth Circuit as moot).

[246] *Harper*, 445 F.3d at 1170–71.

[247] *Id.* at 1202 (citing two separate policies prohibiting (a) "negative comments or behavior based on

and a prior disruption involving anti-homosexual speech, school officials isolated Harper from the general student body for the school day.[248] Responding to this punishment, Harper filed multiple First Amendment claims, including a facial challenge to the school's various anti-harassment policies.[249] Although the district court denied Harper's motion for a preliminary injunction, finding that his tee shirt constituted a substantial disruption, the district court failed to address Harper's facial challenge.[250] Accepting Harper's interlocutory appeal, a divided Ninth Circuit employed a heavily criticized *Tinker* analysis.[251]

Breaking with prior student speech jurisprudence, the Ninth Circuit construed *Tinker* as providing two alternative grounds for restricting student speech: speech causing "substantial disruption," or speech that "impinge[s] upon the rights of other students."[252] Relying on *Tinker's* alleged second ground, the Ninth Circuit concluded, "Harper's wearing of his tee shirt 'collides with the rights of other students' in the most fundamental way."[253] Finding such psychologically harmful student speech detrimental to the "educational development" of homosexual students,[254] the court held the First Amendment inapplicable to "instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."[255] Despite articulating a novel extension of existing student speech jurisprudence, the *Harper* majority refused to address Harper's overbreadth challenge to the school district's anti-harassment policies; thus avoiding "an examination that would cause us to discuss prematurely a number of controversial constitutional issues."[256]

In a vigorous dissent, Judge Kozinski confronted the facial validity of the school district's anti-harassment policies head on.[257] After describing the majority's holding as "entirely a judicial creation, hatched to deal with the situation before us, but likely to cause innumerable problems in the future,"[258] Judge Kozinski found Harper's overbreadth challenge to be the dispositive issue of the case.[259] Insisting on the

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race, ethnicity, sexual orientation, religion, or gender;" and (b) "negative comments, slurs, or behaviors based on race, ethnicity, sexual orientation, religion, or gender").

[248] *Id.* at 1172.

[249] *Id.* at 1173.

[250] *Id.* at 1175 n.11 ("The district judge apparently concluded that the validity of the School's anti-harassment policies was not before him, or that it was not necessary to decide that question, and we cannot say that his determination was unreasonable.").

[251] *See, e.g.*, Abby Marie Mollen, Comment, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1504–07 (2008).

[252] *Harper*, 445 F.3d at 1177.

[253] *Id.* at 1178.

[254] *Id.* at 1179 ("Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers *and interfere with their educational development.*") (emphasis added).

[255] *Id.* at 1183.

[256] *Id.* at 1175 n.11.

[257] *Harper*, 445 F.3d at 1201 (Kozinski, J., dissenting).

[258] *Id.*

[259] *Id.* at 1202 n.12.

applicability of *Saxe's* heightened "well-founded expectation" analysis,[260] Judge Kozinski found the school's harassment policy "substantially overbroad, largely for the [same] reasons articulated by the Third Circuit in *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001)."[261]

A degree of uncertainty surrounds *Tinker's* "rights of other students" prong in light of *Morse*. Unlike *Fraser* and *Hazelwood*, the *Morse* majority conspicuously declined to recognize the "rights of other students" prong in affirming *Tinker*.[262] Similarly, Justice Alito's concurrence construes *Tinker* to solely permit "the regulation of student speech that threatens a concrete and 'substantial disruption.'"[263] Even Justice Breyer's concurrence fails to recognize *Tinker's* "rights of other students" as an independent justification for student speech restrictions.[264] This break with *Fraser* and *Hazelwood's* construction of *Tinker* lends some credence to the view that the "rights of other students" prong is mere dicta. In light of *Morse's* narrow construction of *Tinker*, coupled with *Harper's* lack of precedential value, a strong argument exists that non-disruptive student speech may not be restricted pursuant to the "rights of other students."

In the post-*Morse* student speech landscape, *Tinker's* "substantial disruption" analysis appears to be the preferred rationale for determining the constitutionality of student speech restrictions. Although *Morse* did not explicitly foreclose *Tinker's* "rights of other students" prong as providing an alternative basis for student speech restrictions, *Tinker's* "substantial disruption" analysis remains universally recognized as the soundest constitutional basis for restricting student speech.

V. IN DEFENSE OF *NUXOLL*

In the post-*Morse* environment, student speech jurisprudence presents two competing views of *Tinker's* required burden of proof for determining the facial validity of a school district's anti-harassment policy. On one hand, the Third and Fourth Circuits' heightened "well-

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[260] *Id.* at 1205.

[261] *Id.*

[262] *Compare* Morse v. Frederick, 551 U.S. 393, 403 (2007) ("*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)), *with* Hazelwood Sch. Dist. v. Kuhlmeier (*Hazelwood*), 484 U.S. 260, 266 (1988) (construing *Tinker* to provide for the restriction of student speech where "school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'") (quoting *Tinker*, 393 U.S. at 509), *and* Bethel Sch. Dist. No. 403 v. Fraser , 478 U.S. 675, 680 (1986) (construing *Tinker* to provide for the restriction of student speech "that intrudes upon the work of the schools or the rights of other students").

[263] *Morse*, 551 U.S. at 422 (Alito, J., concurring).

[264] *Id.* at 429.

founded expectation" burden of proof results in a policy of judicial intervention, where the federal judiciary closely scrutinizes the judgment of elected school officials pursuant to the overbreadth doctrine.[265] On the other hand, the Seventh and Tenth Circuits' loyal application of *Tinker's* "reasonable forecast of substantial disruption" standard results in a policy of judicial restraint, where the federal judiciary defers judgment on the propriety of student speech restrictions to elected school officials.[266] Beyond disagreement as to *Tinker's* burden of proof, much uncertainty surrounds the issue of what facts rise to the level of *Tinker's* "substantial disruption." In the context of a facial challenge, Judge Posner's *Nuxoll* analysis provides a comprehensive framework for resolving the underlying constitutionality of a given student speech restriction. This Part examines the propriety of invoking the overbreadth doctrine to strike down student speech restrictions, Judge Posner's *Nuxoll* analysis, and the scope of *Tinker's* "substantial disruption."

A. The Overbreadth Doctrine and Student Anti-Harassment Policies

In the years following *Saxe's* controversial holding, then-Judge Alito's application of the overbreadth doctrine has faced sharp criticism from courts and commentators.[267] A harassment policy may be unconstitutionally overbroad if "there is 'a likelihood that the statute's very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court'" to a substantial degree.[268] Arguably, four distinct structural flaws underlie the Third and Fourth Circuits' liberal application of the overbreadth doctrine in the realm of student anti-harassment policies.

First, on a formalist level, *Saxe* and its progeny unilaterally heighten *Tinker's* burden of proof by requiring far more than a "reasonable forecast" of disruption. In the words of Justice Fortas, a

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[265] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254–55 (3d Cir. 2002) (same).

[266] *See, e.g.*, West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) ("[W]here school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression") (quoting *Tinker*, 393 U.S. at 509).

[267] *See, e.g.*, Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 671 (7th Cir. 2008) ("A judicial policy of hands off (within reason) school regulation of student speech has much to recommend it. . . . [J]udges are incompetent to tell school authorities how to run schools in a way that will preserve an atmosphere conducive to learning . . . ."); *see also* Thomas R. Baker, *Tinkering with Tinker: The Third Circuit's Overbreadth Test For School Anti-Harassment Codes*, 164 EDUC. L. REP. 527 (West 2002).

[268] *Saxe*, 240 F.3d at 214 (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984)).

school may prohibit "actually or potentially disruptive conduct"[269] where there exist "any facts which might reasonably have led school authorities to forecast substantial disruption."[270] In contrast, *Saxe* purports to require "a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech" for the suppression of student speech.[271] Accordingly, an honest reading of *Tinker* cannot stand for the proposition that student speech restrictions must be based on prior, similar disruptive speech. As six circuit courts of appeals observe, "*Tinker* does not require certainty that disruption will occur."[272]

Second, on a functionalist level, *Saxe's* prior disruption analysis would require school officials to allow disruption to occur before restricting obviously disruptive student speech.[273] Such a standard poses difficult problems relating to school discipline; "school officials would be between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation."[274] As the Sixth Circuit astutely observed, "Such a rule is not required by *Tinker*, and would be disastrous public policy: requiring school officials to wait until disruption actually occurred before investigating would cripple the officials' ability to maintain order."[275] In light of *Tinker's* permissive attitude toward restrictions on student speech interfering "with the requirements of appropriate discipline in the operation of the school,"[276] a strong argument exists that the Third and Fourth Circuits'

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[269] *Tinker*, 393 U.S. at 505 (emphasis added).

[270] *Id.* at 514.

[271] *Saxe*, 240 F.3d at 212.

[272] LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (holding "*Tinker* does not require school officials to wait until disruption actually occurs before they may act" and "[f]orecasting disruption is unmistakably difficult to do. *Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.") (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973); *see, e.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009) (holding "*Tinker* and its progeny allow a school to 'forecast' a disruption and take necessary precautions before racial tensions escalate out of hand"); Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) (emphasis added) ("Taking the case law as a whole we don't think a school is required to prove that unless the speech at issue is forbidden serious consequences will *in fact* ensue. . . . It is enough for the school to present 'facts which might reasonably lead school officials to forecast substantial disruption.'") (quoting Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827–28 (7th Cir.1998)); Barr v. LaFon, 538 F.3d 554, 565–66 (6th Cir. 2008) (holding "*Tinker* does not require disruption to have actually occurred" and "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door") (quoting Lowrey v. Euverard, 497 F.3d 584, 591–92 (6th Cir. 2007)); Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place"); *id.* (also holding "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue") (internal citations omitted); West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366–67 (10th Cir. 2000) (holding "[t]he fact that [a student's] conduct may not have resulted in an actual disruption of the classroom . . . does not mean that the school had no authority to act. The district had the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance.") (quoting West v. Derby Unified Sch. Dist. 23 F. Supp. 2d 1223 (D. Kan. 1998).

[273] *Lowery*, 497 F.3d at 596.

[274] *Id.*

[275] *Id.*

[276] *Id.* at 588 (citing *Tinker*, 393 U.S. at 513).

application of the overbreadth doctrine conflicts with *Tinker's* holding.

Third, on a more abstract level, the Supreme Court has yet to define the precise contours of *Tinker's* holding in relation to an overbreadth challenge of a given student speech policy. In *Tinker*, the Court merely addressed an as-applied challenge to a school district policy, "express[ing] no opinion as to the form of relief which should be granted."[277] Subsequent to *Tinker*, the *Fraser* Court reversed the Ninth Circuit's overbreadth analysis,[278] upholding the constitutionality of a school district's "obscene language" policy.[279] As the Third Circuit itself recognizes, "the Supreme Court's resolution of student free speech cases has been, to this point in time, without reference to the overbreadth doctrine."[280] Thus, a plausible argument exists that *Saxe's* extension of the overbreadth doctrine into the realm of student speech conflicts with *Tinker's* core holding.

Finally, a strong argument exists that then-Judge Alito's *Saxe* analysis misapplies an "elementary rule"[281] of the overbreadth doctrine. Before striking down a speech restriction as unconstitutionally overbroad, a court must determine whether the policy "is susceptible to a reasonable limiting construction . . . [and] 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[282] The Third Circuit correctly applied this principal in *Sypniewski*, striking down problematic language within a policy to "save [the policy as a whole] from unconstitutionality."[283] However, then-Judge Alito refused to apply this "elementary rule" to the policy at issue in *Saxe*.[284] Despite noting "that the Policy's first prong . .

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[277] *Tinker*, 393 U.S. at 514.

[278] Bethel Sch. Dist. No. 403 v. Fraser, 755 F.2d 1356, (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986).

[279] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) ("[P]etitioner School District acted entirely within its permissible authority in imposing sanctions [on] offensively lewd and indecent [student] speech" and "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct . . . the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

[280] DeJohn v. Temple Univ., 537 F.3d 301, 313 (3d Cir. 2008) (emphasis added).

[281] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001).

[282] *Id.* (quoting Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa., 944 F.2d 137, 144 (3d Cir. 1991).

[283] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 259 (3d Cir. 2002) (striking down a policy's "ill-will provision" as overbroad, while upholding the remainder of the policy pursuant to "reasonable limiting construction" analysis).

[284] The policy at issue in *Saxe* restricted "(1) verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics and (3) has the purpose or effect of either (3a) substantially interfering with a student's educational performance or (3b) creating an intimidating, hostile, or offensive environment." *Saxe*, 240 F.3d at 216. Then-Judge Alito took issue with two aspects of the policy. First, he took issue with the policy's "purpose" component, noting "the Policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech 'which has the *purpose* . . . of' interfering with educational performance." *Id.* at 216 (emphasis added). Second, he took issue with the "Policy's second criterion [that] prohibits speech that 'creates an intimidating, hostile, or offensive environment.'" *Id.* at 217. Had then-Judge Alito loyally applied Supreme Court precedent mandating "that every reasonable construction must be resorted to," the Policy could be narrowly construed to restrict only (1) verbal or physical conduct (2) that is based on one's personal characteristics and (3) has the effect of substantially interfering with a student's educational performance. *Id.* at 215. Paradoxically, then-Judge Alito himself noted "[w]e agree that the Policy's first prong, which prohibits speech that would 'substantially interfere with a student's educational performance,' may

. may satisfy the *Tinker* standard,"[285] then-Judge Alito struck down the policy in its entirety.[286] Thus, a strong argument exists that then-Judge Alito's *Saxe* analysis contains fatal analytical defects.

Judge Posner's *Nuxoll* analysis avoids the pitfalls described above by loyally applying *Tinker* and its progeny in the context of a facial challenge. In the absence of guidance from the Supreme Court, the *Nuxoll* court's two-tiered analysis creates a viable framework for resolving the facial validity of a given anti-harassment policy.

B. Examining Judge Posner's Functionalist Analysis

In *Nuxoll*, Judge Posner articulated a deferential conceptualization of *Tinker's* holding: a two-tiered substantial disruption analysis. First, Judge Posner addressed what quantum of evidence satisfies *Tinker's* required burden of proof, adopting *West's* faithful application of *Tinker's* "reasonable forecast" standard.[287] Second, Judge Posner addressed what facts rise to the level of "substantial disruption."[288]

As to *Tinker's* "reasonable forecast" burden of proof, Judge Posner described the determinative issue as whether "a school is required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue."[289] Acknowledging the inherent difficulty of carrying such a heightened burden in the absence of a prior disruption, Judge Posner rejected *Saxe's* misconstruction of *Tinker's* holding.[290] Loyally applying *Tinker's* proscribed burden of proof, Judge Posner found *Tinker* satisfied where "the school [presents] 'facts which might reasonably lead school officials to forecast substantial disruption.'"[291] Having determined the scope of *Tinker's* "reasonable forecast," Judge Posner proceeded to address the more difficult questions: "[W]hat is 'substantial disruption'? Must it amount to 'disorder or disturbance'? Must classwork be disrupted and if so how severely?'"[292]

To resolve the scope of *Tinker's* "substantial disruption," Judge Posner distilled three basic principles from *Fraser* and *Morse*. First, *Morse's* holding demonstrates that "avoiding violence, if that is what 'disorder or disturbance' connotes, is not a school's only substantial concern."[293] Accordingly, a school district's authority to restrict student

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satisfy the *Tinker* standard.'" *Id.* at 217.

[285] *Saxe*, 240 F.3d at 217.

[286] *Id.*

[287] Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008).

[288] *Id.* at 674.

[289] *Id.* at 673.

[290] *Id.*

[291] *Id.*

[292] *Nuxoll*, 523 F.3d at 674.

[293] *Id.* at 674.

speech is not limited to speech provoking physical violence.[294] Second, *Morse's* holding recognizes the compelling governmental interest in preventing psychological damage from drugs[295] and that "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people . . . ."[296] Just as Congress has recognized a school's interest in "educating students about the dangers of illegal drug use,"[297] the Supreme Court has recognized the State's compelling interest in "eliminating discrimination."[298] Because "'sexual harassment' is 'discrimination' in the school context under Title IX,"[299] even the Third Circuit acknowledges a school district's "compelling interest in preventing harassment."[300] Third, *Morse's* holding displays the Supreme Court's willingness to permit the suppression of particularly harmful student speech[301] "without the school's having to prove a causal relation" between the banned speech and physical or psychological harm.[302] Although the evidence is "suggestive rather than conclusive,"[303] an increasing amount of medical research links psychologically harmful student speech (based primarily on race, gender, and sexual orientation) to disruption of the educational process.[304]

Relying on the three principles cited above, the Seventh Circuit held "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."[305] Applying this rule to the school district's ban on "derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability,"[306] Judge Posner found the policy a constitutional attempt "to maintain a civilized school environment conducive to learning"[307] in an even-handed

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[294] *See id. But cf.* Bragg v. Swanson, 371 F. Supp. 2d 814, 826–28 (W.D. W. Va. 2005) (implying *Tinker*'s substantial disruption test requires a prior, violent disruption for the restriction of otherwise protected student speech).

[295] *Nuxoll*, 523 F.3d at 674.

[296] Morse v. Frederick, 551 U.S. 393, 407 (2007) ("School years are the time when the physical, *psychological*, and addictive effects of drugs are most severe.") (emphasis added) (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[297] *Id.*

[298] Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

[299] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

[300] DeJohn v. Temple Univ., 537 F.3d 301, 319–20 (3d Cir. 2008); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 ("Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest.") (citations omitted).

[301] *See Morse*, 551 U.S. at 403–09 (allowing for the restriction of student speech "reasonably viewed as promoting illegal drug use" without proof of a causal link between the student speech in question and illegal drug use).

[302] *See Nuxoll*, 523 F.3d at 674 ("We know from *Morse* that the Supreme Court will let a school ban speech—even speech outside the school premises—that encourages the use of illegal drugs, without the school's having to prove a *causal relation* between the speech and drug use.") (emphasis added).

[303] *Id.* at 671.

[304] *See supra* notes 20–38 and accompanying text.

[305] *Nuxoll*, 523 F.3d at 674 (emphasis added).

[306] *Id.*

[307] *Id.*

manner.[308] Although acknowledging that "[t]his particular restriction . . . would not wash if it were being imposed on adults,"[309] the Court distinguished the public school environment, noting that "high-school students are not adults . . . and school authorities have a protective relationship and responsibility to all the students."[310] In light of a school district's exposure to harassment liability[311] arising out of this "protective relationship and responsibility to all the students,"[312] the Court reasoned that if such an anti-harassment policy is invalidated, "the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment."[313]

C. Anti-Harassment Student Speech Policies: Can Educational Harm Constitute Substantial Disruption?

In light of "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech,"[314] Judge Posner's two-tiered *Nuxoll* analysis provides vital guidance for policy drafters seeking to comply with the contradictory pulls of free speech and harassment jurisprudence. For an anti-harassment policy to pass constitutional muster, the school district must carry its burden of proof by demonstrating a "reasonable forecast" of "substantial disruption."[315] Unfortunately, *Tinker* does not explicitly address whether disruption need encompass all or a significant portion of the student body, or whether disruption can occur from isolated student-to-student speech. However, such a determination is unnecessary for resolving the facial validity of a given anti-harassment student speech policy. Pursuant to

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[308] *See id.* (noting the "even-handed" operation of the challenged school policy prohibiting all derogatory comments, regardless of the speaker's viewpoint). Additionally, a strong argument exists that the policy (prohibiting "derogatory comments . . . that refer to race, ethnicity, religion, gender, sexual orientation, or disability") fits squarely within *R.A.V.*'s "secondary effects" exception for content-discriminatory speech restrictions. *See* R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992). Pursuant to *R.A.V.*, a content-discriminatory speech restriction is permissible where the classification "happens to be associated with particular secondary effects of the speech, so that the regulation is *justified* without reference to the content of the . . . speech." *Id.* (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

[309] *Nuxoll*, 523 F.3d at 674.

[310] *Id.* at 674–75.

[311] *See id.* at 675.

[312] *Id.*

[313] *Id.* Due to *Davis*'s extremely high burden of proof (which requires a showing of severity, pervasiveness, and objective offensiveness), Judge Posner exaggerates a school district's exposure to harassment liability. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

[314] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001).

[315] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

Tinker, student speech "materially disrupt[ing] classwork"[316] or "interfer[ing] with work" constitutes a "substantial disruption."[317] Where a school district can "reasonably forecast" that particular student speech will objectively inhibit the educational performance of an identifiable class of students, a strong argument exists that such speech may be constitutionally suppressed as a disruption of classwork.[318]

Addressing what quantum of evidence rises to the level of *Tinker's* "reasonable forecast" of "substantial disruption," the *Nuxoll* court found *Tinker* satisfied where a school district presents evidence of "a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school."[319] Accordingly, a plausible argument exists that a school district may carry its burden of proof by presenting one of two types of evidence. First, even within the Third or Fourth Circuit, a district may point to prior instances of student speech causing an objective decline in the educational performance of other students.[320] Second, outside of the Third or Fourth Circuit, a district may plausibly rely on peer-reviewed medical research showing a direct correlation between the prohibited student speech and negative educational performance.[321] Where a school district bases a student speech policy on peer-reviewed medical literature, such evidence should ideally conform to the standard of *Daubert v. Merrell Dow Pharmaceuticals Inc.*[322] to justify the preemptive suppression of specific student speech.[323] A school district could hardly satisfy *Tinker's* "reasonable forecast" with inadmissible

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[316] *See id.* at 513 ("*But conduct by the student*, in class or out of it, *which for any reason*—whether it stems from time, place, or type of behavior—*materially disrupts classwork* or involves substantial disorder or invasion of the rights of others *is, of course, not immunized by the constitutional guarantee of freedom of speech*.") (emphasis added).

[317] *Id.* at 514.

[318] *See, e.g.*, *Tinker*, 393 U.S. at 513 ("[C]onduct by the student . . . which for any reason . . . materially disrupts classwork . . . is, of course, not immunized by the constitutional guarantee of freedom of speech"); Barr v. LaFon, 538 F.3d 554, 566 (6th Cir. 2008) (holding "fear of racial violence caused an increase in absenteeism among African-American students [is] *the epitome of disruption in the educational process*.") (emphasis added); *Nuxoll*, 523 F.3d at 674 ("[I]f there is reason to think that a particular type of student speech will lead to a decline in students' test scores [or] an upsurge in truancy . . . the school can forbid the speech.").

[319] *Nuxoll*, 523 F.3d at 674.

[320] *See, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 262 (3d Cir. 2002) ("Here, the history of racial hostility demonstrates the policy was intended to address a particular and concrete set of problems involving genuine disruption—not merely lack of mutual respect.").

[321] *See, e.g.*, *Nuxoll*, 523 F.3d at 671 (upholding a school district's "reasonable forecast" of disruption on the basis of peer-reviewed medical research showing "adolescent students subjected to derogatory comments about [race, ethnicity, religion, gender, sexual orientation, or disability] may find it even harder than usual to concentrate on their studies and perform up to the school's expectations."); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006) ("The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that 'academic underachievement, truancy, and dropout rates are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school.'") (quoting Susanne M. Stronski Huwiler and Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.P.R. 151, 164 (1999)), *vacated as moot*, 549 U.S. 1262 (2007); Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1370–71 (N.D. Fla. 2008) (same).

[322] 509 U.S. 579, 592–94 (1993).

[323] *See Harper*, 445 F.3d at 1199 (Kozinski, J., dissenting) (implying that peer-reviewed medical research, meeting the *Daubert* standard, may serve as the basis for student speech restrictions).

evidence.

Thus, in the case of a student speech restriction protecting an identifiable class of students from educationally harmful speech, an administrator could conceivably construe the banned speech to be a "substantial disruption." Where a school district's anti-harassment policy is limited to suppressing student speech that "materially disrupts classwork," a strong argument exists that the policy is facially constitutional under *Tinker's* "substantial disruption" analysis.[324] In jurisdictions loyally applying *Tinker's* "reasonable forecast" standard, a well-drafted anti-harassment policy allowing for the restriction of educationally harmful student speech is not per se overbroad.

VI. DRAFTING CONSTITUTIONAL STUDENT SPEECH POLICIES

When drafting anti-harassment student speech policies, school districts face First Amendment concerns beyond mere compliance with existing student speech jurisprudence. As previously discussed, a broad and encompassing speech restriction may be struck down on overbreadth or vagueness grounds.[325] Conversely, a narrow and specific speech restriction may be struck down on viewpoint discrimination grounds.[326] The difficulty of successfully balancing these competing considerations cannot be underestimated.

In jurisdictions that faithfully apply *Tinker's* "reasonable forecast" of "substantial disruption" standard, the following policy achieves the desired goal of minimizing a school district's harassment liability exposure while conforming to student speech jurisprudence:

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[324] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("*But conduct by the student*, in class or out of it, *which for any reason*—whether it stems from time, place, or type of behavior—*materially disrupts classwork* or involves substantial disorder or invasion of the rights of others *is, of course, not immunized by the constitutional guarantee of freedom of speech*.") (emphasis added).

[325] *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214–15 (3d Cir. 2001).

[326] *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992). However, a strong argument exists that a student-speech policy prohibiting "derogatory comments . . . that refer to race, ethnicity, religion, gender, sexual orientation, or disability" fits squarely within *R.A.V.*'s "secondary effects" exception for content-discriminatory speech restrictions. *R.A.V.*, 505 U.S. at 389. Pursuant to *R.A.V.*, a content-discriminatory speech restriction is permissible where the classification "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'" *Id.* at 389 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)). However, the Supreme Court has explicitly held that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" Boos v. Barry, 485 U.S. 312, 321 (1988). Although the "emotive impact" of psychologically harmful student speech does not implicate the "secondary effects" exception to *R.A.V.*'s holding, a strong argument exists that the *educational impact* of such speech squarely implicates *R.A.V.*'s "secondary effects" rationale. *See R.A.V.*, 505 U.S. at 389. Despite the existence of a strong legal argument, no court has recognized "educational impact" as within *R.A.V.*'s "secondary effects" analysis. Unless and until the Supreme Court recognizes "educational impact" as a "secondary effect" justifying content-based speech restrictions, the impact of *R.A.V.*'s holding on student speech policies remains unresolved.

Prohibited Conduct:

1. Verbal, written, or physical conduct based on a student's:

Race,
Color,
National Origin,
Religion,[327]
Gender,
Sexual Orientation, or
Disability;

2. That has the effect of substantially interfering with a student's educational performance by:

Materially disrupting classwork,
Disrupting the requirements of appropriate discipline in the operation of the school,
Causing a decline in grades or attendance, or
Otherwise disrupting the work of the school.

Although a majority of lower courts look favorably on such student speech restrictions,[328] Third and Fourth Circuit jurisprudence closely scrutinizes the facial validity of all student speech restrictions.[329] Accordingly, a school district within the Third or Fourth Circuit may be better served by abstaining from implementing a vigorous and protective student speech policy. In light of cases such as *Saxe*, *Sypniewski*, and *Newsom*, a school district could reasonably determine that the costs of litigating the facial validity of such a policy outweigh the benefits of "provid[ing] a useful guide for students, parents, and others involved in the school community."[330]

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[327] Despite the absence of a federal statute proscribing religious harassment, a plausible argument exists that a school district could restrict such student speech under *Tinker*'s substantial disruption analysis.

[328] The Ninth Circuit has gone so far as to hold that a school may only punish a student for exercising free speech rights pursuant to an existing statute or school rule. *See, e.g.*, Karp v. Becken, 477 F.2d 171, 176 (9th Cir. 1973) ("However, for discipline resulting from the use of pure speech to pass muster under the First Amendment, the school officials have the burden to show justification for their action. . . . Absent justification, such as a violation of a statute or school rule, [a school] cannot discipline a student for exercising [free speech] rights.").

[329] *See, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 259–60 (3d Cir. 2002) ("It is apparent, therefore, that most racially hostile conduct could be regulated and punished even without a racial harassment speech code, so long as it is disruptive. . . . Speech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech.") (citing *Saxe*, 240 F.3d at 207); Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 258 (4th Cir. 2003) (holding "speech codes in general are looked at with disfavor under the First Amendment because of their tendency to silence or interfere with protected speech").

[330] *See* Martha McCarthy, *Anti-Harassment Provisions Revisited: No Bright-Line Rule*, 2008 BYU EDUC. & L.J. 225, 245 (2008) (conducting a cost-benefit analysis of adopting and enforcing anti-

VII. CONCLUSION

By granting students a private right of action against their school for student-on-student sexual harassment in *Davis*, the Supreme Court created powerful incentives for school districts to minimize their exposure to harassment liability by adopting restrictive student speech policies. However, in the absence of guidance from the Supreme Court regarding the permissible contours of student speech policies, lower courts have provided inconsistent and contradictory rulings on the facial validity of such policies. Although the threat of a tyrannical administrator running roughshod over students' free speech rights is a substantial concern, expansion of the overbreadth doctrine into the realm of student speech jurisprudence fails to address the threat of administrative tyranny. Whereas it is a district's democratically elected school board that adopts a given anti-harassment policy, school administrators are charged with enforcing the terms of such a policy. When an administrator abuses his or her discretion in enforcing a student speech policy, the preferred means of protecting students' free speech rights is through an as-applied challenge. Because an honest reading of *Tinker's* "reasonable forecast" standard permits a district to adopt and enforce a viewpoint-neutral anti-harassment policy, invocation of the overbreadth doctrine to strike down student speech restrictions lacks a textual anchor in student speech jurisprudence.

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harassment student speech policies).